

INDIANA COURT OF APPEALS
CASE AT A GLANCE



TORT LAW

Does a Realtor who is showing a prospective buyer a house that is under construction or a drywall contractor who is working on the house have a duty to warn the prospective buyer about a defective step on the property?

*Christine
Masick &
John Masick
v. McColly
Realtors,
Inc. and
Saxon
Drywall,
Inc.*

CASE SYNOPSIS

**Facts and Procedural
History**

On October 2, 2003, Christine Masick and a real estate agent, Melissa Capellari, were looking at a house that was under construction. Capellari worked for McColly Realtors, who had been retained by the builder and property owner, Hollandale Builders, to sell the house.

In the garage, Hollandale had placed a temporary wooden step leading to the house. Hollandale built the step and took it from house to house during construction projects. The step was not attached to the wall.

On that day, employees of Saxon Drywall were working in the house and garage. One Saxon worker noted the step was not at-

tached to anything and wobbled when he stepped on it. Because the step moved when he stepped on it, he decided not to use it and just stepped over it. The drywall worker told the Realtor the step was not sturdy and that she should be careful. Masick was in the room with the drywall worker and the Realtor at that time. Later, after Masick had been looking at the inside of the house, she entered the garage. The step gave way and she fell.

In March of 2005, Masick sued McColly and Saxon, claiming both were negligent because they did not warn her the step was dangerous. Both McColly and Saxon asked for summary judgment (see "Glossary of Terms"), asserting there were no issues of fact that would require a trial and that they were therefore entitled to judgment as a matter of

Appeal from:

Jasper
Superior Court

The Honorable
J. Philip
McGraw,
Judge

**Oral
Argument:**

October 31,
2006
1:00 p.m. –
2:00 p.m.
30 minutes
each side

*Masick v. McColly Realtors, Inc. and Saxon Drywall, Inc.***Case Synopsis (continued)**

law.

The trial court granted summary judgment to McColly and Saxon, and Masick brought this appeal.

Parties' Arguments

Masick argues Saxon had a duty to warn her of the unsafe step because Saxon was in control of the area, nobody else knew about the dangerous condition, and it was foreseeable to Saxon that Masick might be injured by the step. Saxon notes it did not build, design, maintain or guarantee the step; rather, Hollandale built, owned, and maintained it. Therefore, Saxon says, it did not exercise enough control over the step to cause it to have a duty to warn Masick about it.

As to McColly, our Indiana courts have not decided whether a real estate agent has a duty to warn prospective homebuyers of conditions on the property. Masick argues the Realtor should have such a duty in this case because the Realtor was aware of the condition, Masick was not, and this kind of injury was foreseeable to the Realtor. Even if

Realtors generally do not have such a duty to warn, Masick argues there was one in this particular case because this Realtor usually warns her customers about hazardous conditions in the houses she is showing. Masick says the Realtor did not give such a warning about the step.

McColly Realtors, like Saxon, says it could not have a duty to warn because only parties who are in control of an area have such a duty. McColly says it did not own or control the step. It also argues that imposing such a duty on a Realtor would be unfair because a Realtor does not necessarily know more about the premises than does the prospective buyer and this rule would require a Realtor to inspect each property before showing it. Finally, McColly argues its agent did not voluntarily take on such a duty because the only warning about the step was given by the drywall installer.

Case Synopsis (continued)

GLOSSARY OF TERMS

Tort: A non-criminal breach of a legal duty one person owes to another that results in injury.

Negligence: Failure to exercise the care that a reasonably prudent person would exercise in a similar situation.

Duty: A legal obligation one person owes to another.

Breach: A violation of a legal obligation one person owes to another.

Proximate Cause: Something that produces a result or effect (such as an injury.)

Foreseeable: Reasonable to anticipate.

Pleadings: The formal legal documents in which a party to a lawsuit sets forth or responds to claims or defenses.

Motion: A request that the Court make a ruling or issue an order.

Summary Judgment: A procedural device to resolve a dispute without a trial when there is no issue as to the facts that would determine the outcome and one party is entitled to judgment as a matter of law.

“Designated” Evidence: Evidence submitted to the Court along with the pleadings for resolution of a motion for summary judgment.

Premises: A house or other building, along with its grounds.

Premises Liability: Liability a person who owns or controls a premises might have for injuries that result from conditions or activities there.



Opinion in this case expected:

By the end of
Calendar Year
2006

*For students at
Elkhart Central
High School, a
printed copy of
the opinion will
be forwarded to
Ms. Hogarth.*

For more information, please visit the Indiana Court of Appeals website at <http://www.in.gov/judiciary/appeals/>

Or contact:

Maura Pierce
Community Liaison
Indiana Court of Appeals
115 W. Washington Street
Suite 1270 South
Indianapolis, IN 46204
(317) 234-4859
E-mail: mpierce@courts.state.in.us

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TODAY'S PANEL OF JUDGES

Hon. Patricia A. Riley (Jasper County), Presiding

- Judge of the Court of Appeals since January 1994

Patricia A. Riley, currently the presiding judge for the Court of Appeals' Fourth District, was named to the Indiana Court of Appeals by Governor Evan Bayh in January of 1994. A native of Rensselaer, Indiana, Judge Riley earned her bachelor's degree from Indiana University-Bloomington in 1971 and her law degree from the Indiana University School of Law-Indianapolis in 1974. Early in her career she served as a Deputy Prosecutor in Marion County and a public defender in Marion and Jasper counties before entering into private practice in Jasper County. She served as a judge of the Jasper Superior Court from 1990 to 1993. She is a former associate professor at St. Joseph's College in Rensselaer and currently an adjunct professor at the Indiana University School of Law-Indianapolis.

Judge Riley's legal memberships include the Indianapolis Bar Association, the Marion County Bar Association, and the Indiana State Bar Association, including co-chair of the ISBA's Racial Diversity in the Profession Section; member, Women in the Law Committee; and member, Committee on Improvements in the Judicial System. Judge Riley is the former chair of the Appellant Practice Section of the American Bar Association, and a member of the ABA's Judicial Division International Courts Committee. She is a member of the Indiana Judges Association and the Board of Directors of the National Association of Women Judges. Judge Riley is the mother of two sons. She was retained on the Court by election in 1996 and stands again in this fall's election.

The Court of Appeals hears oral argument at venues across the state to enable Hoosiers to learn about the judicial branch.

This initiative began just prior to the Court's centennial in 2001.

Today's oral argument is the 170th case the Court of Appeals has heard "on the road" since early 2000.

Among the sites for traveling oral arguments are law schools, colleges, high schools, and county courthouses.

TODAY'S PANEL OF JUDGES

Hon. L. Mark Bailey **(Decatur County)**

- Judge of the Court of Appeals since January 1998

L. Mark Bailey was appointed to the Indiana Court of Appeals by Governor Frank O'Bannon in January of 1998 and was re-elected on the Court by election in 2000. Before his appointment, Judge Bailey was a trial court judge, an administrative law judge, and a practicing attorney. He earned his B.A. from the University of Indianapolis in 1978; his J.D. from Indiana University School of Law at Indianapolis in 1982; and his M.B.A. from Indiana Wesleyan University in 1999.

During his legal career, Judge Bailey has served public interest and professional organizations in various capacities. He chaired the Local Coordinating Council of the Governor's Task Force for a Drug-Free Indiana and the Judicial Conference Alternative Dispute Resolution committee. He also served on the Board of Managers of the Indiana Judges Association and the Judicial Ethics Committee of the Indiana Judicial Center. Judge Bailey is Past-Chair of the Indiana Pro Bono Commission, having been awarded the Indiana

Bar Foundation's Pro Bono Publico Award and the 2002 Randall Shepard Award for his pro bono contributions. His writings include, "A New Generation for Pro Bono," published in the *Indiana Lawyer* in 2006. He is also a certified civil mediator and a Master in the Indianapolis American Inn of Court.

A strong supporter of law-related education, Judge Bailey is currently a member of the Judicial Education Committee of the Judicial Conference of Indiana. He is also an adjunct professor at the University of Indianapolis and, in February of 2006, served as the Distinguished Jurist in Residence at Stetson University College of Law. In 2004, Judge Bailey and his First District colleagues received the Indiana Bar Foundation Law-Related Education Award for their commitment to bringing oral arguments into community settings. Judge Bailey is also a frequent presenter at Indiana Continuing Legal Education seminars, and he regularly volunteers to judge law school trial advocacy and moot court competitions and to teach National Institute of Trial Advocacy programs.

The 15 members of the Indiana Court of Appeals issue some 2,500 written opinions each year.

The Court of Appeals hears cases only in three-judge panels. Panels rotate three times per year. Cases are randomly assigned.



TODAY'S PANEL OF JUDGES

Hon. Melissa S. May (Vanderburgh County)

- Judge of the Court of Appeals since April 1998

Melissa S. May was appointed to the Court of Appeals in April of 1998. Judge May was born in Elkhart, Indiana. She graduated from Indiana University-South Bend with a B.S. in 1980 and from Indiana University School of Law-Indianapolis with a J.D. in 1984.

Between law school and her appointment to the Court, Judge May practiced law in Evansville, Indiana, focusing on insurance defense and personal injury litigation.

Judge May has been active in local, state, and national bar associations and bar foundations. She served the Indiana Bar Association on the Board of Managers from 1992-1994, as Chair of the Litigation Section from 1998-1999, as Counsel to the President from 2000-2001, and as co-chair of the Futures Taskforce. In addition, she was a member of the Board of Directors of the Indiana Continuing Legal Education Forum from 1994-1999 and has been the co-chair of ICLEF's Indiana

Trial Advocacy College from 2001-2005. She is a fellow of the Indiana Bar Foundation, as well as for the American Bar Association, and she is a Master Fellow of the Indianapolis Bar Association.

From 1999 till December 2004, Judge May was a member of Indiana's Continuing Legal Education Commission, where she chaired the Specialization Committee. She is currently on an Advisory Panel to the Specialization Committee. In 2005, she was named to the Indiana Pro Bono Commission. In 2003, Judge May was named to the American Bar Association's Standing Committee on Attorney Specialization. She is now special counsel to that committee.

In the spring of 2004, Judge May became adjunct faculty at Indiana University School of Law-Indianapolis, where she teaches a trial advocacy course. Also in the spring of 2004, she was awarded an Honorary Doctor of Civil Law from the University of Southern Indiana. Judge May was retained on the Court of Appeals by election in 2000.



ATTORNEYS FOR THE PARTIES

For Appellants, Christine Masick & John Masick:
Robert J. Boughter
Stiles Boughter, L.L.P.
Fort Wayne, Indiana



Robert J. Boughter was born on July 28, 1975 in New Castle, Pennsylvania. He received his undergraduate degrees in criminology and Spanish *magna cum laude* from Indiana University of Pennsylvania in 1997. Mr. Boughter has also studied at the Universidad de Valladolid, Spain and El Centro Bilingüe in Cuernavaca, Morelos, Mexico.

Following undergraduate school, he served as a special agent for the Office of Inspector General, where he investigated fraud in governmental agencies.

Mr. Boughter received his Doctor of Jurisprudence degree from Indiana University- Bloomington School of Law in 2002. Following law school, Mr.

Boughter worked as an insurance defense attorney where he defended trucking companies, municipalities, police departments, grocery stores, and individuals from personal injury claims.

In March 2006, Mr. Boughter partnered with Randall B. Stiles, a fellow graduate of Indiana University- Bloomington School of Law, to form the law firm of Stiles Boughter, L.L.P. Mr. Boughter's primary practice areas are plaintiff's personal injury, worker's compensation and civil litigation, including civil rights violations and employment discrimination.

ATTORNEYS FOR THE PARTIES

For Appellees, McColly Realtors:

**Jennifer Davis Di Federico
Suber & Davis Law Firm
Valparaiso, Indiana**

For Appellees, Saxon Drywall, Inc.:

**James H. Austen
Starr Austen Tribbett
Myers & Miller Law Firm
Logansport, Indiana**

Jennifer Davis Di Federico grew up in Elkhart and graduated from Concord High School. Upon graduation from high school, Ms. Davis attended Indiana University in Bloomington where she received a BA in History and Philosophy. In 1998 she graduated from Valparaiso University School of Law and is a member of Indiana State and Porter County Bar Associations. She has also been an Adjunct Professor at Ivy Tech State College where she taught classes in the paralegal department.

Ms. Davis Di Federico is a partner in the law firm of Suber & Davis in Valparaiso, a firm that specializes primarily in the area of insurance coverage and insurance

defense litigation, but also provides services in the areas of appeals, family law, personal injury, business law and medical malpractice. Very recently, she married Joseph Di Federico and they happily reside in Valparaiso.

James H. Austen was born in Indianapolis on April 21, 1953. He received his bachelor's degree from Ball State University in 1975 and his J.D. *magna cum laude* from Indiana University in 1981, where he was a member of Phi Alpha Delta and Associate Editor of the Indiana Law Review. He passed the bar examination in 1981, and is admitted to practice in Indiana, before the U.S. District Court for both the Northern and Southern Districts of Indiana, and the U.S. Court of Appeals for the 7th Circuit. He is the author of several articles for the Indiana Continuing Legal Education Forum (ICLEF). He was Cass County Deputy Prosecutor in 1986. He is a member of the Cass County, Indiana State and American Bar Associations, and was Secretary/Treasurer of the Cass County Bar from 1986 to 1987, Vice President from 1987 to 1990, and President from 1991 to 1993. He is also a member of the Defense Trial Counsel of Indiana. His practice area of expertise is insurance defense.



AMICUS BRIEFS

A person who is not a party to a lawsuit may file a brief of amicus curiae, with permission of the Court, if he or she has a strong interest in the subject matter.

- There are no amicus briefs in this case.